

MINUTES
CHARLOTTE COUNTY BOARD OF ZONING APPEALS
Wednesday, August 11, 2010 – 9 a.m. – Room 119
Charlotte County Administration Center
18500 Murdock Circle
Port Charlotte, FL 33948-1094

(These minutes are not official until they have been approved by the Charlotte County Board of Zoning Appeals)

Members Present

Tom Thornberry, Chairman
Edmund T. Hittson, Vice-Chairman
Bob Stout, Secretary
Bill Truex
Michael Brown

Staff Present

Derek Rooney, Assistant County Attorney
Nicole C. E. Dozier, Zoning Official
Ken Quillen, AICP, Planner III
Diane Clim, Recorder

I. Call to Order

Chairman Thornberry called the August 11, 2010 meeting of the Board of Zoning Appeals to order at 9:00 a.m.

II. Pledge of Allegiance

Chairman Thornberry led the members and the audience in reciting the Pledge of Allegiance.

III. Roll Call

Roll call was taken; a quorum was present.

IV. Swearing In of Those Giving Testimony

Diane Clim swore in all persons who wished to provide testimony.

V. Approval of Minutes

ACTION: A motion was presented by Ed Hittson and seconded by Bill Truex to approve the minutes of the July 14, 2010 meeting of the Board of Zoning Appeals, with a unanimous vote.

VI. Disclosure Statements

Ex-parte forms indicating site visits concerning the petitions being presented before the August 11, 2010 Board of Zoning Appeals meeting were submitted.

VII. Introduction of Staff/Comments

Chairman Thornberry introduced staff. Nicole Dozier, Zoning Official, Attorney Derek Rooney, and Chair Thornberry made introductory remarks regarding the types of requests that the Board of Zoning Appeals would be reviewing and the standards which must be met, the notification process and how the Board of Zoning Appeals makes its decision.

VIII. New Business

The following petitions were advertised on July 27, 2010: VAR-10-11; SE-10-15; and SE-10-16

Mr. Thornberry said he will be recusing himself and turning the chairmanship over to Mr. Hittson, Vice-Chair for this first petition because he is a plumbing contractor and did give Mr. Truex a proposal contract for this petition job.

Mr. Truex said he handed in his recusal last month when this request was going to be heard.

Mr. Thornberry also welcomed Mr. Michael Brown to the BZA Board – he took Mrs. Seay's position in District I

Petition #VAR-10-11

Gary and Lorraine McBride are requesting a variance to reduce both side yard setbacks from 13' to 10', for a new single-family residence in a Manasota Multifamily-12 (MMF-12) zoning district. The property address is 1180 Shore View Drive, Englewood, Florida and is described as lot 14, block A, of Englewood Shores Subdivision, located in Section 13, Township 41 South, Range 19 East. A complete legal description and additional information are on file.

Ken Quillen presented general information and staff findings for the petition. Bill Truex is the agent for Gary and Lorraine McBride.

Mr. Hittson asked could you explain why there is a difference in the setback calculation with a flat roof as opposed to a pitched roof?

Mr. Quillen said because of the way the definition of the height of a building is worded in the Zoning Code, it says to the highest point of the roof structure, that is why pitched roofs are penalized by that definition and flat roofs gain an advantage. Flat roofs can be built with a smaller setback at the same height, as opposed to a pitched roof building, but it would still have the same usable space, ceiling height, same building.

Ms. Dozier said it is just because of the design of the roof. The roof is designed in kind of an angular way. Your height measurement will be taller than that of a flat roof. It causes the differences as Ken has stated.

Mr. Quillen said for these reasons we are proposing changes in the Zoning Code in the new Land Development regulations and the Manasota Key Code.

Applicant Presentation

Elaine Miller, 300 West Dearborn, Englewood, said she is the president of Suncoast Architect and is the project architect for this project. She said she wanted to address the question a little differently. The reason you are penalized for a sloped roof is if you can imagine a two story house that has a flat roof, is that you calculate the height of that to the flat roof. Take that same building mass and put a slope roof on top of it – your square footage of your house stays the same, the number of floors stays the same, but because of the way that height is determined, it is now a higher building because it is measured to the peak of the roof. The basic essence is, that by adding a roof, which is not habitable square footage, it counts as additional height for the building and you actually lose that habitable space below.

She passed out a booklet with exhibits and explained that information. She discussed a meeting earlier in the year with county staff regarding the overlay code and the plans for this site. She said the Manasota Key code is very complicated. There are inconsistencies and conflicts. She discussed the front elevation of the home and setbacks.

Chairman Hittson opened the meeting to Public Hearing.

Public Input

Kendall Jackson, resident on Shore View Drive, said he lives across from the McBride's property. He owns this house for over 30 years. They have seen a lot of changes over the years. He feels the design of the McBride's home is beautiful. They are listed as non-conforming, but they were conforming in 1964. Now we are all expected to jump through hoops at this later date, trying to make things more energy efficient, better/safer structure and he feels the McBride's should not be penalized because of a new interpretation. The Manasota Key overlay was developed in conjunction with the residents of Manasota Key. The Zoning staff was present, along with the legal staff at every meeting. This was approved unanimously by the County Commission and as recently as 6 months ago, there was a survey taken of 800 property owners on Manasota Key and 80% of those property owners were 100% in favor of the overlay and its intent being kept. We are under fire to change the will of the people on Manasota Key. I would hope you will go along with the will of the people on Manasota Key and the McBride's and help them build a real good addition to our neighborhood.

Tim Krebs, Architect, said he thinks Elaine has narrowed this down. We have a new interpretation and one that blind sighted everyone. It also blind sighted the Manasota Key architectural review board. It also blind sighted one of the staff

members who a few days ago said the step setback was appropriate and approved, then 3 days later met with me about another project and said it was not appropriate. The result of this new interpretation is devastating. He discussed a few examples. He discussed yard minimum. He said he was before this board a few months ago with another project and Mr. Thornberry said this has got to be taken care of. As of today, it still has not been taken care of.

There being no further requests to speak for or against the petition, Mr. Stout moved to close the public hearing, seconded by Mr. Brown. The public hearing was closed with a unanimous vote.

Ken Quillen presented the analysis, conclusion and recommended conditions for the petition.

Mr. Rooney, Assistant Co. Attorney, said before a motion is made, he feels obliged to address the new interpretation issue. He said laws are created and interpreted by people. People make mistakes. That said, the government has an obligation where they find that the provisions of a code of ordinance are illegal, illegible, incorrect, or otherwise no longer applicable to change those regulations. This issue has been going on for quite some time and I understand concerns and the intent of the code, however, the courts will look at the clear and un-ambiguous language of the code itself to derive the intent. Not the desire of those people who created it. They will say if you intended it to be in there, it should be in there. The courts will also strictly construe the Zoning Codes to apply against the government in favor of the property owner when the terms are ambiguous. In this case, we have heard testimony that the County has changed its position on the interpretation. I believe that is true. I believe the County is interpreting the code based on the language of the code. I have not heard any testimony to substantiate a claim that this is not indeed for what it says. This is a very difficult issue especially for the people out in Manasota Key. It puts them in a bind, I agree that it does. Unfortunately, the staff is not under any obligation to repeat mistakes that have been made in the past based on the interpretation. Just as likely a situation is, had this proposal not had the support of its neighbors, but in fact had the outrage of its neighbors and there was nimby (not in my backyard) issues, those neighbors would be entitled to a reversal or quasal decision clearly because the language does not support the application. All that testimony does go to the fact that this is a hardship on the applicants. I believe staff is joining in supporting this variance. I just want to make it clear, unless someone can explain to me otherwise, I am sure if we are making an incorrect interpretation of the code, we will change that interpretation. Up to this point, we have not heard how that interpretation is incorrect. It simply was brought to our attention. We must adhere to it.

Ms. Dozier, Zoning Official, said what Mr. Rooney said is correct. Apparently the code was not being followed correctly by staff. We have realized that was an issue. We have corrected that. This change has been in effect for over a year. It is not brand new. To further correct this particular instance is to correct the code. The language in the Manasota Key code does not refer to the step setback used in this particular area. The code designates it is one-half the building height as defined by our Zoning Code, which measures it all the way to the top of the building as explained earlier. We are trying to fix it and we understand this does cause an inconvenience when it comes to the design of buildings on Manasota Key. It was not a re-interpretation, it was a correction of a mis-interpretation of a misinterpretation based on what was specifically written in the Manasota Key code. We are correcting the text in Manasota Key to reflect what they currently want as their intent as Mr. Rooney has stated.

Board Member Comments and Questions

None

ACTION: A motion was presented by Bob Stout and seconded by Mike Brown that Petition VAR-10-11 be APPROVED based on the Growth Management Staff Report dated August 2, 2010, the evidence and testimony presented at the hearing, and finding that the applicant HAS MET the required criteria for the granting of the variance with 2 conditions.

Motion was approved with a unanimous 3-0 vote (Mr. Brown, Mr. Hittson, Mr. Stout) with the following conditions:

1. This variance as approved by the Board of Zoning Appeals is to reduce both side yard setback requirements from 13' to 10' to allow the proposed new single-family residence only.
2. This variance extends only to the single-family residence as proposed with this application. All future redevelopment of this property, other than the single-family residence proposed in this application, must be constructed according to all applicable codes in existence at that time, unless a variance is granted specific to the development proposed at that time.

For the Record, Mr. Thornberry and Mr. Truex came back to the Board

Petition # SE-10-15

Charlotte County Community Services is requesting a special exception to increase the number of flags permitted from one to three flags, and increase the height permitted from 15' to 20' for two flags and from 15' to 25' for one flag, in a Residential Single Family 3.5 (RSF-3.5) zoning district. The property address is 1185 O'Donnell Boulevard, Port Charlotte, Florida and is described as

parcel P1 being a part of Section 11, Township 40 south, Range 21 East. A complete legal description and additional information are on file.

Ken Quillen presented general information and staff findings for the petition.

Applicant Presentation

Michael Koenig, Charlotte County Community Services, applicant, said he has been sworn in. He said on May 11, 2010 the Board of County Commissioners entered into an agreement with the Veterans of Foreign War Post 5690 to further improve and develop the Veterans Memorial Walkway at North Charlotte Regional Park. The intent is to add 3 flagpoles, flags and monuments for each branch of the service, as well as a monument for the POW/MIA's. This will be done with etiquette of the stars and stripes. North Charlotte Regional Park lies within the Murdock Village mixed use redevelopment area. The park itself is zoned residential, however, it is an 82 acre park, so it should not impact any development that occurs around the park.

Mr. Thornberry asked if he agreed with the staff report and conditions?

Mr. Koenig said absolutely.

Chairman Thornberry opened the meeting to Public Hearing.

Public Input

No one spoke for or against this request.

There being no further requests to speak for or against the petition, Mr. Stout moved to close the public hearing, seconded by Mr. Hittson. The public hearing was closed with a unanimous vote.

Ken Quillen presented the analysis, conclusion and recommended conditions for the petition.

Board Member Comments and Questions

None

ACTION: A motion was presented by Ed Hittson and seconded by Bill Truex that Petition SE-10-15 be APPROVED based on the Growth Management Staff Report dated August 2, 2010, the evidence and testimony presented at the hearing, and finding that the applicant HAS MET the required criteria for the granting of the special exception with 3 conditions.

Motion was approved with a unanimous 5-0 vote with the following conditions:

1. This special exception is to allow the three flags, identified in the staff report, as follows: one flagpole up to 25' high may display one flag up to 25 square feet in area; and two flagpoles up to 20' high may display one flag each up to 15 square feet in area at the location specified in the site plan submitted. The total area of all three flags shall not exceed 55 square feet in area.
2. The site plan presented by the applicant as part of the petition is for illustrative purposes only. The proposed flagpoles must comply with all other applicable codes, including the requirements for permits, if applicable.
3. Any major changes or additions to this special exception shall require a modification of the special exception. Minor changes or additions such as accessory uses or structures may be approved by the Zoning Official.

Petition #SE-10-16

Geri Waksler, Esq., agent for Joe Fellmeth is requesting a special exception to allow a bar to be located within 1,000 feet of an existing church in a Commercial General (CG) zoning district. The property address is 2001 Rio De Janeiro Avenue, Port Charlotte, Florida and is described as part of Tract "J" of Punta Gorda Isles Subdivision, Sub-section 23, in Section 16, Township 40 South, Range 23 East. A complete legal description and additional information are on file.

Ken Quillen presented general information and staff findings for the petition.

Mr. Hittson asked for some background for the rationale how this law came into existence or what it is trying to accomplish?

Mr. Rooney said I was not here when it was passed but it is a fairly common zoning practice to restrict certain uses not for themselves, but for certain skid row or secondary deleterious effects that they have. I'm thinking adult oriented businesses, alcohol, often these things are limited from institutional uses. For the most part, they are requiring a special use permit which is upheld as a reasonable restraint. Our code operates the reverse. If the bar is there first, and the church comes to the location, there is no impact on the bar. The bar gets to remain. It is a situation where it is not an existing use, but someone is choosing to locate in an area.

Mr. Hittson asked Mr. Quillen, you frequently point out objective 3.1 of the Future Land Use Element. What standards do you use to determine what constitutes respectful?

Mr. Quillen asked – is that under the variance?

Mr. Hittson said you have used that in conjunction with special exceptions before.

Ms. Dozier said there is no definition for respectful so to speak. The issue is just reviewing the uses and seeing what the potential negative impacts can be on the uses between each other, is what it boils down to.

Mr. Rooney said this is a Comprehensive Plan uses. It is broad and over our code.

Applicant Presentation

Geri Waksler, Esq., BigW Law, represented the applicant. **Ms. Waksler** said the church is located in a store front diagonal from where this property is. It's leasing space. This corner was always designated as commercial on the original plat of Deep Creek. It provides services for the neighborhood. We are requesting a special exception. Standards 1, 3 and 5 relate to whether it is a permitted use. We completely agree with staff's assessment on that. We mostly agree with conditions # 2, 4 and 6, which relates to compatibility, buffers and the detriment to the surrounding areas. But I do have one issue with regard to the buffers. Criteria 2 is that the requested special exception is compatible with existing uses, surrounding immediately adjacent and contiguous to the land on which the special exception would exist. The tavern is a commercial use requested to be placed in a long standing and existing commercial zoning district. Technically, there are no residential uses immediately adjacent and contiguous to the site. When it was designed and platted by Punta Gorda Isles Inc., they created buffers. There is nothing immediately contiguous and adjacent. There are residences near by, but separated by the green belt. The tavern will only serve beer, wine and champagne and will not have any live entertainment. Just a community tavern/pub. All located in a fully enclosed building. No tables outside. She discussed other uses that could be used on this site by right. She said a tavern is a permitted use, but because there is a church near by, they are requesting this special exception. If the church closed up, they would not need this. They accept the conditions from staff, with the exception of condition #3, which would require the applicant to install landscape buffers around the entire site.

Mr. Hittson asked how long the church has been in its location?

Someone said 2 years.

Mr. Brown asked the hours of operation?

Ms. Waksler said they cannot open on Sunday before noon.

Chairman Thornberry opened the meeting to Public Hearing.

Public Input

Grace Amodeo, said she has been sworn. She said this might break the ice for someone else wanting a tavern near a school. She doesn't see any one against this request, so maybe they want it, but a tavern is a little different than a bar. What bothers her is if it does not work out.

Mr. Brown said there is a pizzeria down the road and they serve beer and wine. He wondered about routines also and drunk driving, but if any of that occurs, it is an issue for the Sheriff's department.

There being no further requests to speak for or against the petition, Mr. Stout moved to close the public hearing, seconded by Mr. Brown. The public hearing was closed with a unanimous vote.

Mr. Stout said he wanted to hear a response to the buffer issue.

Mr. Quillen said Section 3-9-7(h) conditions and safe guard says: "Should the Board of Zoning Appeals approve a special exception, the BZA may impose reasonable conditions in order to prevent or minimize adverse effects on other property in the surrounding neighborhood." This is why we recommended bringing the landscaping up to code. Also the Zoning Code has the non-conforming section of the Zoning Code and the intent there is to eventually bring everything into compliance with code including landscaping. This is an opportunity to do that.

Mr. Thornberry asked the applicant, you have agreed to all 4 stipulations?

Ms. Waksler said they agreed to 3 – we do have a big issue as a 1,500 s.f. tenant in a much larger building, to put in considerably more than 1,500 s.f. of landscaping for a use that would be allowed by right without any requirement in the code to put in buffers, but for the presence of a rented store front church.

Ken Quillen presented the analysis, conclusion and recommended conditions for the petition.

Board Member Comments and Questions

Mr. Thornberry said Deep Creek and Punta Gorda Isles did a fine job at that intersection with those commercial establishments. Maybe in the Port Charlotte area, I might want the landscaping, but in this area, I wouldn't have a problem. I also do not think they should have to do the landscaping.

Mr. Stout said he does not believe they should impost hours or buffers.

Mr. Brown said he also agrees with the Chairman. There is buffering and landscaping. There is no live entertainment, so there is no sound to buffer.

Mr. Hittson said he thought it would be unreasonable to ask a tenant to install buffering.

ACTION: A motion was presented by Bill Truex and seconded by Mike Brown that Petition SE-10-16 be APPROVED based on the Growth Management Staff Report dated August 2, 2010, the evidence and testimony presented at the hearing, and finding that the applicant HAS MET the required criteria for the granting of the special exception with conditions # 1, 2, and 4 and a replacement stipulation for # 3 to be – no live entertainment.

Motion was approved with a unanimous (5-0) vote with the following conditions:

1. The special exception, as approved by the Board of Zoning Appeals, is to allow a 1,500 square foot tavern within the existing commercial building.
2. The site plan presented by the applicant as part of this petition is for illustrative purposes only. All permitting procedures and codes, including landscaping and buffers, are applicable to the construction and operation of the existing commercial use and proposed tavern.
3. No live entertainment.
4. Any major changes or additions to this special exception, including any future expansions of the tavern, shall require a modification of the special exception. Minor changes or additions such as accessory uses or structures may be approved by the Zoning Official.

IX. Public Comments -

Mr. Tim Krebs said I am here basically because of the same issue I discussed before. In June, there was a petition heard, Mr. Truex excused himself. At the August hearing, an opportunity to ask for reconsideration was not available because a quorum was not present. Today's meeting is the first opportunity I have to request for reconsideration for side yard setback issues. The variance request prepared by staff included a request for existing construction. I did not petition for anything related to existing building. I have no intention to do so. My request was solely for a 3' 7.5" side yard variance, each side of the new construction which was required because it had been determined that the historic step setback measurements were no longer available in the Manasota overlay. I request the Board reconsider this requirement.

Mr. Hittson said it is my understanding of the rules that a applicant is not permitted to request a rehearing. Is that correct Mr. Rooney?

Mr. Rooney said that is correct, unless he does it at that hearing or the very next hearing.

Mr. Truex said there were only 3 members in July and I recused, so there was only 2 members to vote.

Mr. Rooney said but the issue is the matter could have been raised and continued to this hearing and it wasn't. To preserve their right to make the request – they could have made the request and said there is not a quorum to address my issue, please post pone it until August.

Ms. Dozier said that option was given but not accepted.

Mr. Rooney said he never asked. There was public input at that meeting as there is today.

Mr. Thornberry asked Mr. Krebs if that is correct?

Mr. Krebs said at the July meeting there was no a quorum. I knew Mr. Truex would be recused.

Mr. Hittson said there was a quorum for the meeting.

Mr. Truex said there was a quorum for the meeting, but not a quorum for the petition.

Mr. Thornberry said in June when your request was denied, then the next month, only one of the members who denied the request, would be able to bring it back for discussion or to go on the agenda.

Mr. Krebs said the issue is – solely what I want is the same thing, in the direction that I need to take, is to do exactly what just happened. Now that everyone is aware that there has been a reinterpretation at some point in time of the side yard setbacks on Manasota Key.

Mr. Quillen said he is referring to a variance we heard today and that is irrelevant to his variance.

Mr. Rooney said if you believe that the interpretation that has been given to you is incorrect, the proper course of action is to appeal the Zoning Officials interpretation. In which case, if you are successful, you will not have to ask for anything else from this Board. No variances, no special exceptions. Nothing.

Mr. Krebs said and it will be the variance that I asked for.

Mr. Thornberry said it does not look like this Board can help you. We have rules we have to follow and I believe you have to appeal the 'no' decision.

Mr. Rooney said the time for that has expired. There is a 6 month limitation in the rules. After 6 months, you can bring a substantially similar request to the Board.

Mr. Krebs said again, I must reiterate. The variance presented to you at the June meeting, was not the variance that I requested.

Mr. Quillen said that is incorrect Mr. Chairman.

Mr. Krebs said that is absolutely correct. I asked for only a side yard setback variance.

Mr. Quillen said that was in your request along with others that you also needed to do your project.

Mr. Krebs said I did not request anything else. I requested to use the step setback, and that was the dimensions that you decided, which was changed in a period of about 3 days since Braselton said it wasn't.

Mr. Thornberry said you are out of order asking us to do what you are suggesting to do. We have criteria that we have to follow. We are not going to vote on what you are asking and suggesting. We cannot reconsider that. I strongly suggest you get with the County Attorney and Zoning Official and the Building Official and resolve the difference. Or, reapply for a variance at a date after 6 months.

Mr. Krebs said Derek, I have written you an email, the last email, since this would be a different dimensional.

Mr. Rooney said there is an exception to the reconsideration rule that allows someone who is bringing a separate request. If they are substantially different, they are allowed before the 6 months.

Mr. Krebs said give me a call.

Mr. Truex said just for the record, the vote was 3/0 – Mrs. Seay left early that day and I was recused.

X. **Staff Comments –**

 **Mr. Quillen**, the next hearing has 2 petitions.

XI. **Member Comments –**

Mr. Thornberry said Mr. Krebs needs to get this resolved, let's work with him and get this done.

Mr. Dozier said they are working on correcting the Manasota Key issue and this will be taken care of.

Mr. Truex said he still respectfully does disagree with staff in reference to yard minimum as it states in 3-9-53 – it does reference if it is not specifically in the Manasota Key overlay code, it reverts to the underlying code, which is waterfront management district, which is where the interpretation was before. I still believe that can still be there. It will be nice to see it corrected and changed so we don't have to have this discussion anymore. I did ask Mr. Krebs to contact your office for proper procedure for coming back because he came to me first. For the record, I want you to know I did ask him to contact you.

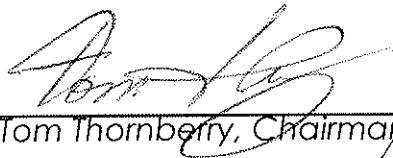
XII. Next Meeting

*The next meeting of the Board of Zoning Appeals is scheduled for
Wednesday, September 8, 2010, at 9:00 a.m., in Room 119.*

There being no further business, the meeting **ADJOURNED** at 10:40 a.m.

Respectfully submitted,

Diane Clim, Recorder



Tom Thornberry, Chairman/Board of Zoning Appeals

Approval Date: 8/8/10